RETALIATION AND COMPENSATION

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There was a time in the history of the Jewish law when injuries to the person were punished by retaliation. In the words of the old legal formula, "as he hath done so it shall be done to him," כאשר עשה כן יעשה לו (Lev. 24, 19). At a much later period we find the law stated thus: "He who injures the person of another is liable for five elements of damages, to wit, for the actual physical harm, for the pain, for the expense of healing, for the loss of time, and for the shame, or mental suffering": החובל בחברו חיב עליו משום חמשה דברים בנזק בצער בריפוי בשבת ובבושת (Mish. B. Ḳ. 8, 1). According to the earlier law, there was an adjustment of the equities of the case by the infliction of injuries on the aggressor similar to those which he had caused; according to the later law, by payment for five elements of damages entering into the loss suffered by the victim of the aggression.[1]

[1] Modern law recognizes the same elements of damages and, in addition thereto, allows punitive damages where the aggressor acted wilfully or maliciously or with gross negligence. All that the injured person is entitled to is compensation, and punitive damages are falling into disfavor. The motive of the aggressor may be of importance in a criminal prosecution, but should have no bearing on the amount to be paid in a civil suit. A man sustains neither more nor less damage because the motive of the aggressor is or is not malicious. If the motive provokes greater violence and results in greater injury the damage will be greater and accordingly the compensation will be increased whereas the same degree of violence resulting in a trifling injury should not entitle the victim to more than a correspondingly small compensation. The wickedness of the aggressor should be punished in the criminal court.

Between these two legal formulae there lies a period of time within which retaliation was supplanted by compensation. The administrators of the law whose judgments are reflected and practically summed up in the above quoted formula of the Mishnah really interpreted the law of retaliation out of existence. This result was not achieved *stante pede,* but was the summation of a process of centuries. The decisions of the judges which step by step carried the law to its final form and the reasoning on which they were based are lost. Talmudic discussion on the subject but faintly reflects the thousand nuances of thought based upon the multiplicity and variety of cases that contributed to the general result.

Passing for the present the Talmudic discussion, we are confronted with a problem of some historical interest. If the old law did indeed prescribe retaliation which was eventually superseded by compensation, is it possible to ascertain the stages by which the change took place? And, furthermore, is it possible to determine when it took place?

In primitive times, the foundations for the law of retaliation were laid down by the natural impulse of the injured person to seek vengenance. He satisfied his desire by injuring or killing his aggressor or some one of the aggressor's family or kinsfolk, or by destroying his cattle or his dwelling or in some other way doing him harm. There was no man to stay his hand or curb his will; he did that which was right in his own eyes.[2] At some time,

[2] The story of Samson well illustrates the lawlessness which the law of retaliation may have been intended to curb, and at the same time shows how the legal principle of retaliation already exists in the desire to avenge a wrong. Samson is married to a Philistine woman. His father-in-law gives her to another under circumstances which indicate innocence of wrong on his part, after Samson has shown his spirit by killing thirty of her

who shall say when, in remote antiquity the idea arose that some restraint on this ancient and unbridled right of vengeance was desirable. It may be that this notion took root along with the idea that the blood feud, whereby murder followed murder in an endless chain, should be checked by recognition of the right of sanctuary. Perhaps the one who committed an assault and who, like the murderer, took refuge in some sacred place, might be given into the hands of the pursuing victim, after the priest at the sanctuary had exacted from the injured person a solemn promise to do no more to his assailant than had been done to him. However this may be, we know that the idea of retaliation is common to many primitive peoples and satisfies the fundamental desire for even handed justice.[3] The beginning of the law on the subject may be sought in a regulation that the injured person shall do no more than inflict the same injury on his aggressor, and the extent of his vengeance shall no more be measured by the strength of his impulse.

That the earliest form of the law of retaliation was a simple restriction on the right of revenge by limiting the penalty to the infliction of a similar injury is an assumption supported by the phraseology of the formula in Exodus, wherein by a terse statement of the penalty, a

people. Samson then adds to his offense by burning their corn, vines, and olives. The Philistines take vengeance by burning his wife and her father, both innocent of wrongdoing. Samson continues the feud by killing the Philistines who thereupon camp against the tribe of Judah, who are to be held responsible for Samson's deeds in order that the Philistines may "do to him as has hath done to us." To the protests of his own tribesmen, Samson retorts, "as they did unto me so have I done unto them" (Judg. 15, 1-11).

[3] The phraseology of the law and its principle are proverbial: כאשר עשה כן יעשה לו (Lev. 24, 19); כאשר עשה לי כן אעשה לו (Prov. 24, 29); כאשר עשית יעשה לך (Obad. 15); ככל אשר עשתה עשו לה (Jer. 50, 29).

limitation is placed on some prior broader right: "Life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, bruise for bruise" (Ex. 21, 23-25). According to this formula, retaliation is prescribed for all personal injuries from the gravest to the most trivial, from murder to a bruise. Four classes of injuries may be distinguished in this formula: (1) those resulting in death; (2) those resulting in loss of organs; (3) those resulting in the loss of limbs; (4) those leaving a mark on the body.

With the beginning of the law of retaliation and probably earlier began the law of compensation. For although retaliation is prescribed as the proper remedy, it is not the exclusive remedy. It is stated as the limitation of a prior unbridled right, and does not preclude the infliction of punishments of less severity. The injured always had the right to accept from the aggressor an apology or gift by way of expiation, and he had the right to exact such terms as he sought to impose as a condition of his waiver of the right to retaliate. This right to exact compensation was originally unrestricted, and depended solely on the will of the injured person, but by repetition it became fixed as custom and eventually as a law of compensation it entirely superseded the law of retaliation in which it had its origin.

It is to be assumed that the acceptance of compensation would occur more frequently in cases of minor injuries. These, being the more common and frequent class, would, by reason of the fact that they were settled by payment, tend to become a class distinct from the more serious injuries. The latter would be recognized as within the law of retaliation, although compensation might be accepted for them, whereas the former would eventually

be taken out of the pale of retaliation and be customarily paid for in damages. This seems to have been the state of the practice at the time when the legal formula in Leviticus summed up the law on the subject. "If a man cause a blemish (מום) in his neighbor, as he hath done so shall it be done to him, breach for breach, eye for eye, tooth for tooth, as he hath caused a blemish in a man, so shall it be done to him" (Lev. 24, 19-20).

Assuming that the text in Leviticus is a summing up of the law at an entirely different time and by an entirely different person than the text in Exodus, it represents a state of the tradition when retaliation was no longer prescribed or *permitted* in cases of simple injuries, but was restricted to cases resulting in death (Lev. 24, 17), or mayhem, i. e. "breaches," broken limbs, loss of organs (Lev. 21, 19). The significant word used here is "blemish" (מום) which, as elsewhere defined (Lev. 21, 18-20; 22, 21-25), means physical injury of such nature as would ordinarily be caused by mayhem. The burning, wounding, and bruising mentioned in Exodus is significantly omitted here: the law was no longer applied as of yore, and for the minor injuries omitted from the formula some other redress had been substituted. This could have been nothing else than compensation. What had originally been a matter of choice and grace with the injured person, had now become customary. For serious injuries the law was as formerly retaliation or compensation; for minor injuries it was compensation or nothing.

The code of laws that we are examining shows an advanced state of custom, not merely by inference from the comparison of the formulae of Exodus and Leviticus, but in at least one specific case. "If men strive together, and

one smite the other with a stone or with his fist, and he die not, but keepeth his bed, if he rise again and walk abroad upon his staff, then he that smote him shall be quit; only he shall pay for the loss of his time, and he shall cause him to be thoroughly healed." It is to be noted that this case provides a penalty only for temporary injuries inflicted during a fight in the heat of blood; it is not concerned with the death or permanent injury of the injured person. The man inflicting a temporary hurt is free or quit subject to his obligation to pay for loss of time and medical expenses.[4]

We may assume that in a community which recognizes the right of compensation but not of retaliation in cases such as this, the practice of accepting compensation for injuries for which retaliation was permitted, was probably well known. The custom of compensation having once been recognized, it must soon have won its way as a substitute for retaliation in many cases of actual unprovoked assault, cases in which, as in the one cited, the injury was not permanent. In such cases the analogy of the rule here laid down would soon establish a rule of compensation for bruises, wounds, and burnings which leave no permanent serious injury and the result would be a custom by which

[4] I am inclined to think that the reason for the leniency of the law in not allowing retaliation in this case, for here surely is a case of wound or bruise, such as would fall under the classification Ex. 21, 23-25, is that the person injured is himself partly at fault. This seems to have been the view of Philo (Yonge's translation, London 1855, 3, 329, "The Law Concerning Murderers" V). It is not the case of one assaulting the other in which retaliation would be the rule, but the case of the one who begins the quarrel being hurt, or the case of two fighting in which neither can be determined to be the aggressor, and one of them getting hurt. The injured man having himself been at fault, cannot be permitted to take vengeance by retaliation; yet the one who struck the effective blow may not be entirely acquit and must pay the actual damages sustained.

such cases would always be compromised in this manner. Thus we see one of the steps in the process of legal evolution from the general law of retaliation as set forth in the formula of Exodus 21, 21-23 to the more limited application of this rule to cases of death and mayhem as set forth in the formula of Lev. 24, 19-20.

We have now to consider the case reported in Exodus 21, 22-23, in connection with which the oldest formula of the law of retaliation is found, a case which presents several difficulties. "If men be fighting and strike[5] a woman with child so that she miscarry, and she do not die,[6] he shall surely be punished according as the woman's husband shall lay upon him, and he shall pay in the presence of the judges;[7] but if she die, then thou shalt give life for life." If the woman was injured as the result of a deliberate blow by one of the fighting men, the case is clear enough, as falling within the law of retaliation; if, however, the

[5] ונגפו. Rashi says *ad loc.* אין נגיפה אלא לשון דחיפה והכאה; see I Sam. 4, 3; Sanh. 109*b*: דמחי לאיתתא. Targum renders ונגפו by ויתחון and והכה (Ex. 21, 18) by ויתחי.

[6] ולא יהיה אסון. אסון here probably means death. See Gen. 42, 4. 38; 44, 29. Targum ולא יהא מותא.

[7] ונתן בפללים, usually translated, "and he shall pay as the judges determine." The contradiction between the two dicta whereby on the one hand the husband and on the other the court determines the amount of compensation, has long been noted. Some see a corruption of the text (Holzinger, *Exodus,* in Marti's Comm., p. 85). Ibn Ezra says: כאשר ישית עליו אבי הילדים אם יעשה בחפצו הנוגף ואם לאו יתן על פי בית דין. Dr. Max L. Margolis suggests that it is not impossible that in the present instance פללים is an abstract noun denoting something like "equity" as Saadiah renders it, comp. Is. 16, 3. Dr. Julius H. Greenstone called my attention to an opinion of Ehrlich in מקרא כפשוטו, I, 178, to the same effect. I am quite convinced that the translation "by the judges" is wrong and admit the difficulty, principally linguistic, of the meaning suggested by me in the translation in the text. The real meaning of the phrase is yet to be ascertained.

blow was accidental, how shall it be included in the category of cases in which retaliation may be applied? Let us imagine the case of two fighting men in their rage utterly oblivious of their surroundings. A woman approaches, comes within reach, and is hurt. Shall it be said that this is a case in which they shall be held to account, when the woman was guilty of what we should call the grossest negligence in deliberately walking into the danger zone? Surely this cannot have been the intention of the law. I am of the opinion that this decision intended to provide for the special case of the pregnant woman who thrust herself into the *melée* notwithstanding the danger to herself, for the purpose of making peace between the contending men, and who was injured either by a blow or by being thrust out of the way. This assumes that the woman had the right to thus attempt to make peace, for if she had no such right, she would certainly not be entitled, under any system of law with which we are familiar, to redress for any injury she received. (We are reminded of the situation depicted in Deut. 25, 11.) Furthermore we are struck by the fact that the law emphasizes that she is pregnant. The matron, not pregnant, or the maid, attempting to interfere would not fall within the purview of this law. Had the pregnant woman special rights which are here reflected? Did her condition give her the right of way? If these queries should be answered in the affirmative, we still have the difficulty arising in the case where she is pregnant but not visibly so. The unique character of this case prevents us from grouping it under any of the known categories of biblical laws. May we not therefore be justified in believing that we have here a survival of some

older laws relating to a time when the rights of women were especially notable?

Diod. Sic., III, 33, cited by Wilutzky, *Vorgesch. d. Rechts,* I, 26, mentions the fact that among the Ethiopians the person of woman was inviolate, and armed warriors in battle array ceased fighting when elderly women stepped among them commanding peace. Whether this be the result of the dominance of a matriarchal system or not, it is a significant parallel. The pregnant woman on the highway, as perhaps in an earlier state of the law, any matron on the highway, commanding peace, was entitled to absolute obedience on penalty of life or limb.[8]

If the woman dies, the assailant is put to death; if she suffer any serious injury the assailant is punished by retaliation, or (ex hypothesi) by compensation. If she merely miscarries, he must pay the husband the value of the child that aborted, the amount of the damage being fixed by the husband. Here we have a case analogous to the right to exact compensation instead of retaliating, i. e. the right of the victim of an assault. Supposing the assailant refuses to pay the amount demanded by the husband? Under the older law the husband would have retaliated in some way, probably by taking life for the life of his unborn child. The fear of this was probably sufficient sanction to enforce payment of the sum demanded. The payment having been agreed to, was made in the presence of the פללים who acted

[8] In connection with this, note Grimm, "Rechtsalterthümer": If an outlaw flees to women, let him live for their sake. Also the creation of sanctuary on the highway by the presence of vestal virgins. And among the Samoans fighting stops before female heralds. Wilutzky, III, 184. How completely the original meaning of this case is forgotten is shown by the LXX version, Philo "Concerning Murderers" sec. 6 and the version of Josephus Ant. IV, viii. 33.

not judicially but ministerially, merely recording the fact of payment.[9]

The only other biblical case relating to retaliation is that of the false witness in an action for personal injuries. "If the witness be a false witness, he hath testified a falsehood against his brother; then shall ye do unto him as he had purposed to do unto his brother... And thine eye shall have no pity, life for life, eye for eye, tooth for tooth, hand for hand, foot for foot" (Deut. 19, 18-21; see Susannah 1, 62). That such a case would not fall under the law of retaliation in the absence of special provision is obvious, for it is only the one inflicting the injury who is subject to retaliation, and it requires rather nice reasoning to assimilate the law relating to the false witness to that relating to the aggressor. The law in Deuteronomy seems to stand between those of Exodus and Leviticus. Unlike Exodus and like Leviticus, it does not include ordinary wounds and bruises. It differs from Leviticus in mentioning hand and foot, whereas Leviticus uses a general term "breach" to include these and other injuries, the result of the assault.

We may now consider another important point. How far is the matter of retaliation one for judicial cognizance? I am inclined to the opinion that it became so as soon as the law of retaliation was adopted. In the earliest times when each man did what was right in his own eyes, there was no law of retaliation, and punishment was inflicted by the victim or his folk in such manner as to him or them seemed best. But as soon as men awoke to the need of re-

[9] If ונתן בפללים means payment according to the award of the court, may it not be a gloss indicating an advance of the law to this stage from the earlier stage in which the payment was made out of court and for the amount demanded by the husband?

stricting this right by limiting the punishment to retaliation, there must have been some way of enforcing this restriction. There must have been recourse to some tribunal to enable the victim to have his revenge lawfully by retaliation and at the same time to protect the aggressor from excessive punishment. It is thus fairly inferable that the matter was one for the court in very early times. We have proof that it was so at least as early as the existence of the law relating to the false witness recorded in Deuteronomy. There can be no false witnesses except in a trial of a cause. The trial here referrred to is of a controversy in which the punishment of retaliation was to have been inflicted if the defendant were to be found guilty. It seems therefore pretty well established that personal assaults were triable offenses where the offense had to be proved and the punishment was then inflicted by the prosecutor under the supervision of the court.

Ancient law does not distinguish between civil and criminal law, and the procedure in both cases is the same. In the case of an ordinary debt, the court determines the liability and then turns the debtor over to the creditor to pay out of his estate or by his personal service. Obviously all this had to be done under the eye of the court. Similarly in cases of assault, the court determined the truth of the charge and then turned the assailant over to his victim for retaliatory punishment. Now, in like manner as the creditor could remit the debt in whole or in part, so the victim of an assault could remit the punishment or accept money in lieu of inflicting it. Before the matter was heard by the court and certainly between judgment and execution, there must, in most cases, have been influences at work for adjusting the difficulty. Mutual friends, benevo-

lent elders, chieftains interested for political reasons in protecting the aggressor and securing him immunity, added to the natural instinct of most men to be placated by gifts, turned the desire for retaliation into willingness to accept compensation and "money became the ransom of a man's life" (Prov. 13, 8). In cases of minor assaults these influences easily prevailed, and it became general custom to settle them by payment of damages, a custom which thereafter became law. In the meantime the more grievous assaults were still punishable under the strict law of retaliation, subject to the right of the victim to accept compensation, and eventually, even in these cases, the custom of compensation prevailed. Even in cases of homicide blood money was taken for the life of the slayer and it required the positive mandate of the law, "Ye shall take no redemption money for the life of the murderer who is guilty of death, but he shall surely be put to death" (Num. 35, 31), to restore, in this one class of cases, the old law of retaliation which had been superseded by the general practice of compensation in all cases of assault. And the law then stood as follows: for all minor assaults, compensation in damages; for murder, the retaliatory penalty of death; for all grave assaults, retaliation or compensation. In the latter case however, although the law of retaliation was still theoretically in force it had been in practice superseded by compensation. It required but one step more to bring the law to its modern form, i. e. the legal recognition of the right of compensation as the exclusive remedy and the prohibition of retaliation entirely, except in cases of homicide. This step was taken by the Tannaim, and was

followed by the adoption of a fixed scale of prices for various injuries.

Between the close of the biblical canon and the earlier Tannaim the law was as above stated. Retaliation was still legally recognized but practically abandoned. Philo seems to regret this condition and pleads in favor of the old strict law of retaliation which, according to him, made for equality and equity, whereas the acceptance of money compensation tended to unsettle the biblical law. But he recognizes that rigid adherence to the old law is no longer expedient and that the degree of punishment must be determined by the circumstances of each case.[10]

Following Philo we have the dicta of three persons, Jesus, Josephus, and Eliezer b. Hyrcanos, to the effect that the law of retaliation had not been abolished in cases of grave assaults in the nature of mayhem at least as late as the first century of the Christian Era. Jesus said (Matt. 5, 38): "Ye have heard that it hath been said, an eye for an eye and a tooth for a tooth; but I say, etc." Had the rabbinical law been fully developed and had it then been generally accepted that eye for eye means money for eye, it is unlikely that he would have completely ignored it.

[10] Philo "On special laws, etc.," Yonge's trans., III, 348. Bähr, *Das Gesetz über falsche Zeugen,"* 28, is of the opinion that Philo's preference for the old law rather than for the later law is due to his familiarity with other systems of jurisprudence. But the error of Bähr and many others lies in their theory that in Philo's day the rabbinical law had already reached the point stated in Mishnah that "eye for eye" meant "money for eye." The law in Philo's day was as stated above and he is one of the conservatives who tried to stem the tendency of the general custom of accepting compensation from becoming the law and legally superseding retaliation, as it afterwards did. Ritter, "Philo und die Halachah," 21, states that Philo and the Halakah were in conflict and that Josephus took a middle path between them. This likewise assumes what is not true, namely that the Halakah in Philo's time was the same as that stated in Mishnah.

Josephus says (Ant. IV, 8, 35; Whiston's translation): "He that maimeth any one, let him undergo the like himself, and be deprived of the same member of which he hath deprived the other, unless he that is maimed will accept of money instead of it; for the law makes the sufferer the judge of the value of what he has suffered, and permits him to estimate it, unless he will be more severe." This statement shows that the law of retaliation is still in force, and it confirms three conclusions reached above: (1) that it applied only to cases of mayhem, (2) that the injured person might accept compensation and that he was the sole judge of the amount, (3) that judicial interference with this right had gone so far as to prevent an unconscionable exercise of it.

In the light of what has been said it will be possible to understand the reason for the opinion of Eliezer b. Hyrcanos that the law of retaliation is to be taken literally, an opinion given at a time when the current of rabbinical opinion had set strongly toward legally recognizing compensation as the sole remedy. The Talmud (B. Ḳ. 84*a*) reports Eliezer as saying "eye for eye, (means) actual (eye for eye)," עין תחת עין ממש. When the later jurists came to the discussion of this question, they could not understand the reason for this opinion, and offered explanations which, failing to take the historical point of view, are obviously unsatisfactory. But the fact that Eliezer, who flourished at the end of the first century holds this opinion, even though he is apparently in a minority of one, is significant. He was a rigid conservative who prided himself on the fact that he never offered an opinion that had not been handed down to him by his masters. His dictum therefore indicates that his masters also held it and that through them there was preserved the strict tradition of the old

law of retaliation, even though in common practice the tendency toward compensation had long been in vogue. Eliezer was the last recorded representative of the upholders of the old law based upon a strict construction of the biblical text and ignoring the almost universal practice that had supplanted it. The dominant opinion represented by men like Ishmael b. Elisha and his school, was that the general practice of compensation represented the true meaning of the biblical law and that the biblical law of retaliation had (and here they invoked the aid of a common expedient, a legal fiction) always meant compensation since the time it was first promulgated.[11]

After the eclipse of Eliezer, no other rabbinical voice is reported in favor of the old law of retaliation and the decisions are unanimously in favor of the view that compensation was and always had been the proper remedy. Therefore when the Mishnah was compiled, the law of retaliation was completely ignored and the then well established universal practice of allowing compensation for the injury received, found expression in the text stated at the beginning of this paper, "He who injures the person of another is liable for five elements of damage, to wit: for the actual physical harm, for the pain, for the expense of healing, for the loss of time, and for the shame or mental suffering."

Although the Mishnah became authoritative (Yeb. 42*b*: הלכה כסתם משנה), it did not immediately settle the question

[11] See opinion of the school of Ishmael, B. Ḳ., 84*a*, also Simon b, Yoḥai's opinion (*ibid.*). For the indentification of the Eliezer here mentioned with Eliezer b. Hyrcanos I am indebted to Dr. Henry Malter who referred me to Weiss' edition of Mekilta, p. 91, and Geiger's discussion in החלוץ, vol. VI, p. 28, and to Dr. Julius H. Greenstone who referred me to Geiger, *Ges. Schr.*, Hal. Section, p. 162, and Weiss, דור דור ודורשיו, I, p. 111.

that had been so long mooted, i. e. how can the written law and the practice be reconciled. The biblical law of retaliation, of divine origin, was theoretically unchangeable; the later law of compensation was the result of centuries of changing interpretation and custom. The old law was thus in fact abolished although, theoretically, because of its peculiar sanction, it could be neither changed nor abolished. The biblical law read "eye for eye"; the universal practice now crystallized into rabbinical law prescribed "money for eye." How shall these inharmonious legal principles be reconciled? The Amoraim cut the Gordian knot by the assumption that the Written Law did not mean what it said; that when Moses prescribed retaliation, he meant and was always understood to have meant, compensation; that "eye for eye" really means "money for eye." By projecting into the distant past their latter-day conception, i. e. by the use of that universal legal expedient, a legal fiction, the Amoraim, while accepting the law as they found it in actual practice, were able to preserve the doctrine of the inviolability of the Written Law. The Gemara clearly reflects the state of uncertainty of the legal mind while this question was being debated. The method of reasoning of the Amoraim shows that the dictum of the Mishnah was not of ancient and unquestioned authority, but rather a new thing still open to debate. Had the Mishnah really reflected the opinion of the Mosaic days there could not have been such painful efforts to explain it as we find in the Gemara, and the opinion of the authorities would have been uniform. Questions of law do not remain in a state of flux for centuries, and although at first they may be subject of bitter controversy, eventually a conclusion is reached and out of the welter of conflicting views an es-

tablished rule arises, which is accepted without question. Such a rule is not open to criticism but merely to expansion. How different it was with the Mishnic rule of compensation the Gemara amply shows. Two classes of opinions may be seen in the report of the debates of the Amoraim, one based on consideration of facts and the other on consideration of words. In the debates in which facts are offered to support the Mishnah, the proponents are defeated and by inference the Mishnah declared to be untenable in the face of the written law, and it is only by the aid of verbal analogies that the proponents of the Mishnah maintain their ground, and this indeed very precariously. For at bottom they are trying to reconcile the irreconcilable, and make "eye for eye" mean "money for eye." The first class of opinions is represented by the Amoraim who support the dicta of Dostai b. Judah, Simon b. Yohai, and the School of Hezekiah, and the second by those supporting the dicta of the School of Ishmael and the School of Hiyya, as well as by the opinion of Ashi (B. Ḳ. 84*a*). That the Amoraim really did not understand the reason for the opinion of strict constructionists like Eliezer b. Hyrcanos is clearly shown by the discussion of his dictum in which the opinions of Rabba, Abaye, and Ashi are cited.[12]

[12] I cite the passage in full to illustrate more clearly. "Rabbi Eliezer said, Eye for eye (means) actual (retaliation)." "Actual (retaliation)? Impossible. Can Eliezer be opposed to all the Tannaim"? Rabba said, He means that the injured person is not to be valued as though he were a slave (in fixing the amount of compensation to which he would be entitled). Abaye answered him, (Is it that you think that otherwise he would be valued) like a freeman? Has a freeman a fixed value? Nay, said Rab Ashi, he (Eliezer) meant to say that we do not estimate the value (of the eye of) the injured person, but that of the aggressor (meaning that as according to the principle of retaliation he should lose his eye, he must now pay as much as it is worth to him to retain it.).

As stated, the Gemara rejects the reasoning based on facts. For instance, it is urged that the law was never meant to be taken literally, because, if a man has a large eye and he puts out the smaller eye of his neighbor it would not be just to allow his eye to be put out, for this is not the equality that the law has in view. To which answer is made that the law says "eye for eye" meaning "eyesight for eyesight," and that therefore the size of the eyes of the parties is irrelevant. So again, it is urged that if a blind man puts out a man's eye, the law could not be literally enforced against him, and therefore it follows that it was never intended to be literally applied, to which answer is made that the law never attempts impossibilities and is intended to apply only to possible conditions, so that wherever the punishment prescribed is impossible, as in the case here cited or in the case of a murder committed by one already mortally wounded, there should be no punishment at all. Finally it is urged that the law was not intended to be taken literally because in putting out the eye of the aggressor he might die and then he would have given "a life and eye for an eye," to which answer is made that before the punishment by retaliation is allowed to be inflicted, the court determines whether the convict is able to stand the punishment and if it be determined that he is strong enough he is punished, and though he may die as a result of it, it cannot be helped for it is no one's fault. Although the Gemara rejects the reasoning based on facts, it approves the reasoning based on mere verbal analogies and peculiarities; for instance the reason known as "the superfluity of texts" (קרא יתירא) It is argued that since the law (Lev. 24, 19-20) says first "so shall it be *done* unto him" and then "thus shall it be

given to him," it follows that money payment is meant because of the use of the word "given." The second text being superfluous is intended to modify the meaning of the first by changing the retaliation into compensation.[13] It seems clear from these discussions that the Talmudists resisted every attempt to reinstate the law of retaliation. To them the biblical law of "eye for eye" had become the mere expression of the principle of equality.[14]

In post-Talmudic times the discussions in the Talmud are occasionally referred to, but never reopened. The settled principle of law that compensation is the proper redress for personal injuries is never questioned. See Targum Jer. on Deut. 19, 21 and compare with Onkelos *ad loc.* Alfasi accepts the principle of compensation absolutely, and does not even find it necessary to refer to the Talmudic discussions (Alfasi, ed. Sulzbach 1766, III, 32*a* on B. Ḳ. VIII). Maimonides (Ḥobel umazzik, 1, 3-6) although accepting the rule of compensation, indicates that he is not satisfied with the Talmudic reasoning whereby the rule is justified. He finds its authority in the common practice which had its origins in Mosaic times and was followed by the courts throughout the generations, כולן הלכה למעשה הן בידינו.

[13] See other similar arguments B. Ḳ. 84*a*.

[14] This is the effect of the opinion of Ashi (B. Ḳ. 84*a*: שאין שמין אותו בניזק אלא במזיק) that the eye of the aggressor was valued and thus the amount to which the injured person was entitled, was ascertained; this amount being what the retention of his eye was worth to the aggressor who was liable to have it struck out. See also opinion of Saadiah ראוי להיותו עינו תחת עינו אם לא יתן כפרו , Ibn Ezra on Ex. 21, 24. Saadiah's statement also shows that the law was not, as the Talmudists argued, always interpreted as in their day, and that literal retaliation was at one time in vogue.

It is needless to say that none of the later law books even suggest retaliation as a proper remedy, the example of contemporary European and Asiatic systems of jurisprudence[15] to the contrary notwithstanding (see Shulḥan 'Aruk, Ḥoshen Mishpaṭ, 420, and commentaries).

[15] VIEWS OF THE SADDUCEES. It was supposed upon the authority of a scholion to Meg. Taan., 4, that the Sadducees (Boethusians) held to the literal interpretation. It is not at all unlikely that many of them did so, for, as was shown, even the Pharisees were not unanimous in their opinion, and the old law was not entirely obsolete. But the authority cited for the opinion of the Sadducees has been shown to be of late origin. It seems to me, however, that this citation, while not valuable as a contemporary record, is not to be ignored entirely. There is no doubt that in the days of the Boethusians, retaliation was still recognized as a legal punishment, and it is also quite possible that they as a sect so interpreted the law. For discussion of the scholion referred to see Brüll, *Jahrb.* 1877, 57; Frankel, *Der gerichtliche Beweis,* 50; Geiger, *Urschrift,* 148; Ritter, *Philo u. d. Halachah,* 133; Graetz, *Monatssch.,* 1876, 410.

SAMARITANS. Dr. James A. Montgomery states in reply to my inquiry: "I know of no reference to the *lex talionis* in Samaritan law. Unfortunately almost nothing has been published on the Samaritan Halakah except Wreschner's valuable treatise "Samaritanische Traditionen," Berlin 1888, in which he treats of a Samaritan halakic commentary. But apart from titles on marriage, testimony, and inheritance, the subjects contained in the commentary are ritualistic. None of the halakic material in the European libraries has been published. And the Samaritans have been so long divorced from civil autonomy, which to a certain extent the Jews enjoyed in various conditions, that I doubt if any traditions of the old criminal law have survived in that sect."

KARAITES. At least some of the Karaites held to the literal meaning of the biblical law (see debate between Ben Zitta and Saadiah reported by Ibn Ezra on Ex. 21, 24). I am indebted to Rabbi Bernard Revel for the following notes on the Karaitic interpretation. Besides Ben Zitta, Benjamin Nahawendi (משאת בניימין, 2, 4) interprets the law literally. Judah Hadasssi (middle of twelfth century; אשבל הכפר, 104, alph. 3, 275) accepts the rabbinical opinion. עין תחת עין ממון. Aaron b. Joseph (המכחר. Ex. 42; Lev. 44*a*) quotes two Karaite opinions. According to the first which he himself accepts, for an unintentional injury there is compensation, for an intentional one, retaliation. According to the second, only permanent injuries, such as loss of limb, require retaliation. Aaron. b. Elijah (in כתר תורה, Ex. 72*a;* Lev. 69*a;* also in his גן עדן, p. 179*a*) states that the

Karaites are divided on the subject of retaliation, there being four opinions: (1) those who take the law literally, (2) those who accept the rabbinic view, (3) those who distinguish between intentional and unintentional injuries, (4) those who hold that the court determines whether retaliation or compensation shall be applied. Solomon (a late Karaite in his אפריון) mentions only one opinion, namely that the penalty depends on the intention. All the Karaites agree that Deut. 25, 12 וקצתה את כפה is to be taken literally.